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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

UNITED STATES OF AMERICA	*
	*
	* 09-cr-30-01-02-GZS
v.	* July 7, 2009
	* 8:30 a.m.
EDWARD and ELAINE BROWN	*
	*
* * * * *	

DAY 6
MORNING SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE GEORGE Z. SINGAL
AND A JURY

Appearances:

For the Government:	Arnold Huftalen, AUSA Terry Ollila, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For Edward Brown:	Michael J. Iacopino, Esq. Kristin Clouser, Esq. Brennan, Caron, Lenehan & Iacopino 85 Brook Street Manchester, NH 03104
For Elaine Brown:	Bjorn Lange, Asst. Fed. Defender Federal Defender's office 22 Bridge Street Concord, NH 03301
Court Reporter:	Sandra L. Bailey, LCR, CM, CRR Official Court Reporter United States District Court 55 Pleasant Street Concord, NH 03301 (603)225-1454

1 I N D E X

2

3 Witness Direct Cross Redirect Recross

4

JAMIE BERRY

5

By Ms. Ollila 10 33

6

By Mr. Lange 22

By Mr. Iacopino 28 35

7

KENNETH NUNES

8

By Ms. Ollila 36

9

By Mr. Lange 47

By Mr. Iacopino 48

10

EDWARD BROWN

11 (Previously transcribed under separate cover)

12

13

14 Motions, page 52

15

16

Exhibits ID Evid.

17

Government's Exhibit No. 11g 45

18

Government's Exhibit No. 4g-1 52

Government's Exhibit No. 1a-a 53

19

Government's Exhibit No. 7a-1 53

Government's Exhibit Nos. 8b through 8w; 9a;

20

9b-1 through 9b-3;

9c-1 through 9c-12;

21

9d; 9e-1 through 9e-7;

9f-1; 11j 54

22

Government's Exhibit No. 1a-3 59

23

24 Defendant's Exhibit No. 2-0 23

25

1 IN CHAMBERS

2 THE COURT: We're in chambers. All counsel
3 are present. We have a juror issue.

4 THE CLERK: Yes, your Honor. Juror Branden
5 Gould, who is in seat 13, his juror number was 48, he is
6 the crane operator --

7 THE COURT: You all remember him?

8 MR. HUFTALEN: Yes.

9 THE CLERK: He advised me this morning that
10 yesterday one of his employees had to leave with a
11 stomach hernia and is in the hospital. He is the only
12 person, Branden now, that can run the cranes. This is
13 his busy season. He's actually been very stressed
14 throughout this trial. He hasn't been sleeping, he's
15 been getting migraines because of his business, and it's
16 a big business, and he feels he's not staying on top of
17 it, so he wanted to bring that to the court's attention.

18 THE COURT: The obvious concern is that he's
19 going to want to rush. He would like to be excused.
20 Government's position?

21 MR. HUFTALEN: As much as I'd like to keep him
22 on the jury, I think it's a legitimate concern not only
23 for him personally, but the issue he alleges.

24 THE COURT: Defendants? Mr. Lange? Do you
25 want to confer outside? You're welcome to.

1 MR. IACOPINO: Your Honor, I have no objection
2 to excusing him.

3 THE COURT: Mr. Lange?

4 MR. LANGE: Nor I.

5 THE COURT: I didn't hear you.

6 MR. LANGE: Nor I.

7 THE COURT: I'm going to let him go. That
8 leaves us with one alternate. We're so close to the end
9 of the case, I'm not terribly concerned. What I plan to
10 do, even if they go deliberate, is I'll keep the
11 alternate in reserve, tell him not to communicate with
12 anyone in case someone has a problem during
13 deliberation.

14 Would you let him know he's free to go, not to
15 discuss this case with anyone.

16 THE CLERK: Yes, your Honor. That would leave
17 alternate number 2, Sona Hirth, will be filling in.
18 I'll take his notebook as well and shred it.

19 THE COURT: Don't have him talk to the other
20 jurors.

21 All right, let me know when we're ready.
22 Okay, thank you.

23 BEFORE THE COURT

24 THE COURT: Ready for the jury? Bring in the
25 jury. Is there something -- yes?

1 MR. IACOPINO: Yes, your Honor, we thought you
2 were going to take a proffer from us on the Christopher
3 Fazio --

4 THE COURT: All right, let me take a look.
5 Have a seat. I have testimony of Christopher; is that
6 correct?

7 MR. IACOPINO: Yes, sir.

8 THE COURT: Are they number one? They're not
9 going to be testifying right now, are they?

10 MR. IACOPINO: No.

11 THE COURT: I'll read it.

12 MR. IACOPINO: Thank you.

13 THE COURT: You have the actual video?

14 MR. IACOPINO: Yes, it's --

15 MS. CLOUSER: Yes, we do. It's Exhibit M.

16 THE COURT: I'll take a look at it during the
17 break. How long is the video?

18 MS. CLOUSER: The first video is 50 minutes.

19 The second --

20 THE COURT: 5-0?

21 MS. CLOUSER: 5-0. The second video is
22 24 minutes.

23 THE COURT: And you expect to play the entire
24 videos, both?

25 MS. CLOUSER: No.

1 THE COURT: You have the portion redacted that
2 you plan to play?

3 MS. CLOUSER: Yes, we do.

4 THE COURT: How long is that?

5 MS. CLOUSER: That is approximately
6 13 minutes.

7 THE COURT: All right, I want that portion
8 available to me during our first recess. I'll take a
9 look at it.

10 MR. IACOPINO: Thank you.

11 THE COURT: Anything else? Let's bring in the
12 jury.

13 BEFORE THE JURY

14 THE COURT: Good morning, members of the jury.
15 Couldn't get the sun to last even another day,
16 unfortunately.

17 You know that one of the members of your jury
18 is not with you. He's been excused. You're not to
19 speculate why or have that in any way relate to what's
20 going on here.

21 We ready to proceed?

22 MS. OLLILA: We are, your Honor.

23 THE COURT: All right. You may proceed.

24 MS. OLLILA: Your Honor, counsel has requested
25 that we approach sidebar on an issue.

1 THE COURT: All right.

2 AT SIDEBAR

3 MS. OLLILA: Your Honor may recall from the in
4 chambers conference last night that counsel objected to
5 this exhibit coming in. The United States had
6 proposed -- and specifically the objection that counsel
7 raised was some additional language which were not
8 co-conspirator statements. The additional language
9 includes the language contained on the top of page two
10 of Government's Exhibit 2i which states, why do you want
11 to know, and who wrote this. The United States proposes
12 that we redact that portion of the e-mail. Counsel has
13 indicated that they don't want that redacted but counsel
14 still does object to the admission of that e-mail.

15 THE COURT: Let me hear from defense counsel.
16 Basis of the objection.

17 MR. IACOPINO: It's the same objection that I
18 made yesterday, your Honor, in terms of it being hearsay
19 and not relating in any -- not being relevant in any way
20 to the conspiracy. The statement that they are trying
21 to get in through this exhibit is not the e-mail from
22 one of the alleged co-conspirators to another alleged
23 co-conspirator, but it's some body of an e-mail
24 apparently addressed to some person named Art Pollack.

25 THE COURT: Would it make a difference if they

1 were talking to -- you're saying the difference is they
2 are not talking to a co-conspirator?

3 MR. IACOPINO: Right. We're saying it's the
4 manner in which it's being offered in that it says
5 something that was written to somebody who we don't even
6 know who he is makes it irrelevant to this case, your
7 Honor, and it's for that reason that we object. I
8 understand that the government's offered to redact it.
9 They did. However, if it's going to come in, we prefer
10 that it come in without the proposed redaction.

11 THE COURT: Mr. Lange.

12 MR. LANGE: I join in his arguments and only
13 add that I submit that this does not fall under Rule
14 801, that it's not a statement by a co-conspirator
15 during the course of the conspiracy which furthers the
16 conspiracy. It appears to be an e-mail written by Riley
17 to Gonzalez sometime after Gonzalez left.

18 MR. IACOPINO: And I agree with that as well,
19 your Honor.

20 THE COURT: So defense counsel is not in favor
21 of any redactions?

22 MR. LANGE: No, we object to it, but if it's
23 going to come in we'd ask that it not be redacted.

24 THE COURT: All right, I'm going to let it in.
25 It's a co-conspirator statement.

1 MS. OLLILA: And there's one final issue, your
2 Honor, that counsel raised with the United States
3 yesterday. It involves Government's Exhibit 2g. This
4 is also an e-mail taken from Cirino Gonzalez's e-mail
5 account. The only portion which the United States wants
6 to get in, your Honor, as a co-conspirator statement is
7 one line contained on page two which says, we have a war
8 to win and we need everybody. The United States has
9 offered to redact the rest of the document, the complete
10 document except that line, and accept the fact it was an
11 e-mail from Danny Riley to Cirino Gonzalez. Counsel has
12 indicated that if your Honor rules that this is a
13 co-conspirator statement, they want the entirety of that
14 document to come in.

15 THE COURT: All right, let me look at it. All
16 right, just for the record, the first document we were
17 just talking about was Government's Exhibit 2i. The
18 document I'm looking at now is 2g.

19 (Pause.)

20 THE COURT: All right, I don't see this as a
21 co-conspirator exception statement. I'm going to let it
22 in.

23 MS. OLLILA: Okay, thank you.

24 THE COURT: Anything else?

25 MS. OLLILA: Nothing further.

1 THE COURT: All right.

2 BEFORE THE JURY

3 THE CLERK: Just to remind you, Mr. Berry, you
4 are still under oath.

5 THE WITNESS: Yes.

6 DIRECT EXAMINATION cont'd

7 BY MS. OLLILA:

8 Q. Dena, please pull up Government's Exhibit 2i
9 and highlight the from and to section.

10 Deputy Berry, who is this e-mail from?

11 A. It's from Dan Riley.

12 Q. And who is it to?

13 A. It's to Cirino Gonzalez.

14 Q. When is it dated?

15 A. It's dated August 4th, 2007.

16 Q. Now, Dena, please turn to page two. And what
17 I want you to do is highlight that section, the first
18 line.

19 Deputy Berry, the first line starts with hum.
20 Can you read that?

21 A. Hum, everything that Ed needs real bad is.

22 Q. And what is the date of this e-mail?

23 A. August 4, 2007.

24 Q. Now, Deputy Berry, if you count down in that
25 e-mail eight lines which starts with batteries Motorola,

1 can you please read -- I'm sorry, six lines starting
2 with someone comes near, could you please read that
3 sentence, and Dena, highlight it starting with someone
4 comes near.

5 A. Someone comes near it, cardboard, thicker the
6 better, roofing nails, bigger better, black and green
7 spray paint, loud sirens, bullhorns, portable 12-volt
8 power jack, they're about 20 to \$30, two-way radios, not
9 the ones that take Triple A batteries, Motorola
10 preferably, I cannot emphasize enough night vision
11 goggles, any reading material to do with tactical
12 training, hand-held scanners trunked if possible,
13 individual cameras hand-held, throw away cell, I believe
14 it's supposed to be phones, hones, with minutes and the
15 phone number written on it with a piece of tape,
16 clothesline rope, you know this hot weather is perfect
17 for drying outdoors and save on Ed's batteries and fuel,
18 parachute cord flares and flare guns, bigger better. Oh
19 yeah, I forgot the number one most important thing.
20 People to come and make a stand to their death if
21 necessary.

22 Q. Okay, stop there. Deputy Berry, let me draw
23 your attention to April of 2006. Dena, you can take
24 that down. In April of 2006 were you conducting
25 surveillance on Edward and Elaine Brown?

1 A. Yes.

2 Q. And was your surveillance in anticipation of
3 arresting Edward and Elaine Brown?

4 A. Yes.

5 Q. Who were you conducting surveillance with?

6 A. Deputy Ken Nunes.

7 Q. And how often were you conducting
8 surveillance?

9 A. I believe we did it for a few weeks every day,
10 Monday through Friday.

11 Q. What is surveillance?

12 A. Just watching an individual. In reference to
13 this we were trying to establish a pattern, see how they
14 lived, see how they reacted throughout the day.

15 Q. Did it appear based on your surveillance that
16 Edward Brown had a job and went to work?

17 A. No.

18 Q. Did it appear based on your surveillance that
19 the defendant Elaine Brown had a job and went to work?

20 A. Yes.

21 Q. Where did she go to work?

22 A. Her dental practice.

23 Q. Do you know where her dental practice is
24 located?

25 A. It's on Glen Road in Lebanon, New Hampshire.

1 Q. Now, after Edward and Elaine Brown left trial,
2 did you also have another job of surveilling -- being
3 surveillance in the area of their Plainfield residence?

4 A. Yes.

5 Q. And when did you approximately start that
6 surveillance?

7 A. I assisted a few times April, May and
8 sometimes in June and July.

9 Q. What did that surveillance consist of?

10 A. Initially it consisted of the installation of
11 the camera across from the driveway, and that was the
12 April/May time frame.

13 Q. How did you install a camera across from the
14 driveway. When you say the driveway, you're referring
15 to their residence?

16 A. Yes.

17 Q. How did you install a camera?

18 A. I -- we inserted in the woods probably a mile
19 from the residence, we followed basically a snowmobile
20 path until we came in front of the driveway. The first
21 camera I didn't actually see physically installed. It
22 was a hard drive digital camera and we would have to go
23 in and swap out the hard drive and the batteries every
24 couple days.

25 Q. Why did you have to swap out the hard drive

1 and the batteries every couple of days?

2 A. The hard drive can only keep so much
3 information and then the batteries only last so long.

4 Q. Now, you didn't do this with people watching
5 you, did you, with neighbors and the Browns seeing you,
6 did you?

7 A. No.

8 Q. You did it in a covert manner; is that
9 correct?

10 A. Yes.

11 Q. How was the quality of that first camera?

12 A. It was very poor.

13 Q. Where was the camera pointed toward?

14 A. It was pointing towards the driveway.

15 Q. At some point in time did you have to replace
16 that camera?

17 A. Yes, it was in May.

18 Q. May of what year?

19 A. 2007.

20 Q. Why did you have to replace that camera?

21 A. It actually was in a water tight container and
22 it wasn't water tight, it actually flooded out a couple
23 times.

24 Q. And what did you replace it with?

25 A. Initially we replaced it with the same camera

1 system but just a newer box which contained the hard
2 drive.

3 Q. And how was the quality of that second camera?

4 A. It was the same. We installed an additional
5 camera after that.

6 Q. So the third camera, how did you install the
7 third camera?

8 A. That one was a little bit more work. Took a
9 bit more team members. Our electronic surveillance unit
10 assisted and we started again a mile from the residence
11 into the woods, followed a snowmobile path, and then
12 installed a camera while we had a line crew who appeared
13 as normal telephone workers, had a bucket and
14 everything, on the van. It appeared to me to be a 56K
15 modem style older system.

16 Q. What does that mean?

17 A. It was basically an older modem. It had a
18 direct phone line that went to that modem which
19 transmitted the camera signal to a location.

20 Q. All the cameras that were utilized, were they
21 pointed at the direction of Edward and Elaine Brown's
22 residence -- excuse me, driveway?

23 A. Just the driveway.

24 Q. Now, with respect to that final camera, how
25 did that operate?

1 A. That operated fine. The video quality was
2 poor. Like I said, it's an older type modem.

3 Q. Why was the video quality poor?

4 A. Personally I believe just because it was an
5 older -- it was an older system. Like I said, it was
6 basically an older modem system and that's how it was
7 explained to us, that this is an older system but it
8 works.

9 Q. How is reception in that area in Plainfield,
10 New Hampshire?

11 A. Horrible.

12 Q. Now, is it also fair to say that you conducted
13 roving surveillance?

14 A. At times, yes.

15 Q. What is roving surveillance?

16 A. A certain area you may want to concentrate on
17 looking for individuals that may have to do with your
18 case or, you know, just kind of watching an area just to
19 see what's going on, times people are coming and going.

20 Q. When you conducted surveillance, you never
21 crawled up on to their property toward their house, did
22 you?

23 A. No.

24 Q. Did you ever see Cirino Gonzalez during your
25 surveillance?

1 A. Yes.

2 Q. Where did you see him?

3 A. One time when we were switching out the hard
4 drives I saw him coming down the driveway in his
5 vehicle.

6 Q. Do you remember approximately what month that
7 was?

8 A. It would have been May 2007.

9 Q. Dena, please pull up 26.

10 Deputy Berry, who is this pictured in the
11 photograph depicted on the monitor in Government's
12 Exhibit 26?

13 A. Cirino Gonzalez.

14 Q. Did something happen on July 17, 2007?

15 A. Yes, there was a vehicle accident.

16 Q. Who got into an accident in a vehicle?

17 A. Jason Gerhard.

18 Q. Whose motor vehicle was he in?

19 A. Elaine Brown's.

20 Q. What happened on July 18th?

21 A. July 18th Jason Gerhard went to the Lebanon
22 Police Department to file a stolen vehicle report.

23 MR. LANGE: Objection, foundation.

24 THE COURT: Lay a foundation. Jury disregard.

25 Q. Do you know how, just yes or no, do you know

1 what happened to Elaine Brown's vehicle on July 17th?

2 A. Yes.

3 Q. Did someone seize that vehicle?

4 A. Yes.

5 Q. Who seized it?

6 A. Ken Nunes and another deputy that was assigned
7 up there with him, I'm not sure who it was.

8 Q. Now, were you present at the Lebanon Police
9 Department on July 18th?

10 A. Yes.

11 Q. Why were you present there?

12 A. Lebanon PD had called. I was dropping off
13 supplies to Ken Nunes, and Lebanon PD had called him to
14 say Jason Gerhard was at the police station to file a
15 stolen vehicle report.

16 Q. Did you go to the Lebanon Police Department?

17 A. Yes, we did.

18 Q. And what did you do when you were there?

19 A. We spoke with Jason Gerhard.

20 Q. Why did you speak with him?

21 A. We were trying to convey a message to go home
22 and don't ruin your life over this.

23 Q. Did he threaten you?

24 MR. LANGE: Objection.

25 THE COURT: Basis?

1 MR. LANGE: It's leading and also foundation.

2 MR. IACOPINO: It's also hearsay, your Honor.

3 MS. OLLILA: Co-conspirator statement, your
4 Honor.

5 THE COURT: It is leading. Ask another
6 question.

7 Q. BY MS. OLLILA: When -- how long --

8 THE COURT: I'm having trouble hearing.

9 MS. OLLILA: Oh, I'm sorry, your Honor. I
10 thought I was so loud I was trying to tone it down.

11 Q. BY MS. OLLILA: Did you sit down with Jason
12 Gerhard, Deputy Berry?

13 A. We didn't sit down. It was kind of just
14 standing, talking to him.

15 Q. How long did your conversation last?

16 A. 45 minutes approximately.

17 Q. And just yes or no to this question. Did he
18 make statements to you about Edward and Elaine Brown?

19 A. Yes.

20 Q. Just yes or no to this next question. Did he
21 make comments to you or statements to you about your
22 attempts to arrest Edward and Elaine Brown?

23 A. Yes.

24 Q. What did he say?

25 MR. IACOPINO: Objection.

1 THE COURT: Basis?

2 MR. IACOPINO: It's hearsay, your Honor.

3 THE COURT: Let me see counsel.

4 AT SIDEBAR

5 THE COURT: I think I know the answer, but let
6 me hear it.

7 MS. OLLILA: The answer is Jason Gerhard told
8 us that our attempts to arrest Edward and Elaine Brown
9 were a violation of the Constitution which constituted
10 treason and are therefore punishable by death.

11 MR. IACOPINO: I object, your Honor, it's
12 hearsay. It's not a statement made in furtherance of
13 the conspiracy, number one. Number two, it's a
14 statement made to a police officer, so I believe under
15 Crawford and the Sixth Amendment it's also inadmissible,
16 and on those bases I would object.

17 MR. LANGE: I join.

18 THE COURT: All right, I think it is a
19 statement in furtherance of the conspiracy made by a
20 co-conspirator and subject to Petrozziello. A statement
21 by a co-conspirator does not have to be made to another
22 co-conspirator to be within that exception. If counsel
23 has any case law that says that, I'd like to see it, but
24 I don't believe that's necessary. I see this as a
25 statement in furtherance of the conspiracy because it's

1 done to discourage attempts to arrest, attempts to scare
2 or intimidate the Marshal Service. Go ahead.
3 Overruled.

4 BEFORE THE JURY

5 Q. BY MS. OLLILA: Deputy Berry, what did Jason
6 Gerhard say?

7 A. To summarize it, if somebody violated the
8 rights set forth within the Constitution, it would be
9 considered treason and executable by death.

10 Q. Executable by death?

11 A. Yes.

12 Q. Where were you on June 7, 2007?

13 A. Farmington, New Hampshire.

14 Q. Why were you in Farmington, New Hampshire?

15 A. Conducting surveillance.

16 Q. Let me show you, Deputy Berry, what is marked
17 and has come into full evidence as Government's Exhibit
18 1a-3. Do you recognize what that is?

19 A. Yes.

20 Q. What is it?

21 A. It's a fingerprint card of Edward Lewis Brown.

22 Q. Where did that fingerprint card come from?

23 A. This would have originated from our office.

24 Q. And do you frequently turn those over when
25 requested to do so?

1 A. Yes.

2 Q. Did you turn this fingerprint card over?

3 A. Not personally, but --

4 Q. Did your office turn it over?

5 A. Yes.

6 Q. I didn't hear that.

7 A. I know one was, yes.

8 Q. Okay.

9 MS. OLLILA: I believe that's it, your Honor.

10 May I have a moment?

11 (Pause.)

12 MS. OLLILA: Nothing further, your Honor.

13 THE COURT: Thank you. Cross-examination, Mr.
14 Lange?

15 MR. LANGE: Yes, your Honor.

16 CROSS-EXAMINATION

17 BY MR. LANGE:

18 Q. You testified about a surveillance camera that
19 was positioned at the end of the Brown driveway. That
20 camera was there on June 7, 2007; is that right?

21 A. Yes.

22 Q. And did you make recordings of the images that
23 were taken from that camera?

24 A. I didn't personally.

25 Q. Did you or someone working in your office make

1 such recordings?

2 A. I believe that that camera was set up straight
3 to a DVR.

4 Q. So that someone could record off a DVR?

5 A. Yes.

6 MR. LANGE: Your Honor, at this time I offer
7 Defendant's Exhibit 2-0. It's a clip from the
8 surveillance video.

9 MS. OLLILA: No objection, your Honor.

10 MR. LANGE: I'd ask that it be played.

11 THE COURT: Exhibit 2-0 is admitted without
12 objection.

13 (Defendant's Exhibit 2-0 admitted.)

14 Q. BY MR. LANGE: Deputy Berry, this is just a
15 clip. This is not the whole --

16 A. Yes, sir.

17 MS. OLLILA: Your Honor, this is just going to
18 take a moment to load up.

19 THE COURT: That will be fine.

20 Q. BY MR. LANGE: There's no audio in this; is
21 that right?

22 A. There's no audio.

23 Q. Do you actually know where the camera was
24 positioned?

25 A. Yes.

1 Q. How far back from Center of Town Road was the
2 camera?

3 A. Maybe 15 feet back.

4 Q. You're aware that an effort was made to arrest
5 Ed Brown at the driveway particularly on the morning of
6 June 7?

7 A. Yes.

8 Q. Are you aware of who came in front of the
9 camera at some point around 8 or 8:30 that morning?

10 A. Yes, Danny Riley.

11 (Video clip being played.)

12 Q. I take it that there are some skipping in
13 this. It does not take a continuous image?

14 A. I'm not sure how it was set up. Because it
15 was an older system I think the data stream was probably
16 a little slow.

17 Q. There was some motion in there at the lower
18 left corner.

19 A. Yes.

20 Q. Do you know what that was?

21 A. I take it it was a person.

22 Q. What -- is the camera looking in the direction
23 of the driveway?

24 A. Yes. On the right you can see the three
25 trees. The driveway I believe is right there.

1 Q. Now we're seeing some figures directly in
2 front of the camera?

3 A. Yes.

4 (Video clip still playing.)

5 Q. Is the driveway just the light area?

6 A. Yes. Just left to the trees I believe is the
7 driveway.

8 Q. A little right of center of the image?

9 A. Ah-hum, yes.

10 Q. When you see something in that driveway area,
11 please let us know.

12 (Video clip still playing.)

13 A. I see a dog.

14 Q. That's also known as Zoe?

15 A. Yes.

16 Q. She's moving from the right side of the image.
17 Now there's a figure behind the tree?

18 A. Yes.

19 Q. That turns out to be Daniel Riley?

20 A. Yes.

21 (Video clip continuing to play.)

22 Q. What's moving across the image now?

23 A. Daniel Riley coming down the driveway with the
24 dog Zoe.

25 Q. He appears to be approaching the agents that

1 are hidden in the woods?

2 A. Yes.

3 Q. Can you tell what's in his hand?

4 A. I can't, but I heard it was a coffee cup.

5 Q. There's motion off to the left. Appears to be
6 the dog?

7 A. Yes.

8 Q. He appears to have his left hand raised over
9 his eyes at some point?

10 A. Yes.

11 Q. Fair to say the dog is coursing back and forth
12 in front of the camera?

13 A. Yes.

14 Q. We don't see any motion from the agents or the
15 marshals at this point, do we?

16 A. No.

17 (Video clip still playing.)

18 Q. Is there any way to tell how long this
19 sequence takes in realtime that you're aware of?

20 A. I have no idea.

21 Q. Mr. Riley seems to be doing the classic
22 looking for something pose there with his hands over his
23 eyes?

24 A. Yes.

25 Q. Now we're seeing motion in the front, and

1 that's the back of one of the marshals?

2 A. Yes.

3 Q. Where's Mr. Riley at that point?

4 A. Up the driveway.

5 Q. Appears to be at least two uniformed personnel
6 going after Mr. Riley?

7 A. Seems to be a few people there. It's hard to
8 tell.

9 Q. Now, there was no other camera positioned
10 along the driveway, is that right, on June 7th?

11 A. I believe there was still another one there,
12 but I don't think it was operational. It was motion
13 sensed.

14 Q. So the only image that we might have as to
15 what occurred between Mr. Riley and the agents around
16 this time is the photo we're looking at now?

17 A. Yes.

18 (Video clip still playing.)

19 Q. I take it that that's one of the deputies
20 going up the driveway to the cleared area?

21 A. Yes.

22 MR. LANGE: Your Honor, at this point there's
23 additional portions if the government wants to look at
24 it or someone wishes to see it. My point has been made.

25 THE COURT: All right. We can end it now,

1 then, if that's what I'm hearing.

2 MR. LANGE: I don't have anymore questions,
3 thank you.

4 THE COURT: Thank you. Mr. Iacopino,
5 questions?

6 MR. IACOPINO: Yes, thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. IACOPINO:

9 Q. Good afternoon -- good morning, deputy.

10 A. Good morning.

11 Q. You indicated that you were involved in
12 surveilling the Browns prior to their arrest on the tax
13 case in May of 2006?

14 A. Yes, sir.

15 Q. All right. And were you involved on the day
16 of their arrest in the tax case in May of 2006?

17 A. Yes, I was, sir.

18 Q. Had you been involved previously in assisting
19 the Internal Revenue Service with conducting a search of
20 the dental practice in Lebanon in 2004?

21 A. No, sir.

22 Q. Are you aware of that search?

23 A. Yes, sir.

24 Q. And was that made known to your agency?

25 A. Yes.

1 Q. And did you have any role in that at all
2 through communications or any other role?

3 A. In the 2004 search?

4 Q. Yes.

5 A. No.

6 Q. Do you know how many agents were involved in
7 that search?

8 A. I have absolutely no idea.

9 Q. Let me take you back, then, to the time prior
10 to the May 2006 arrest of Mr. and Mrs. Brown.

11 You indicated that you conducted some
12 surveillance; is that correct?

13 A. Yes, sir.

14 Q. And on one day during that surveillance you
15 were in the vicinity of the Brown property when Mr.
16 Brown was mowing his lawn; correct?

17 A. The residence, sir?

18 Q. Was it the residence or was it the office?

19 A. The office, I did see him doing some yard work
20 there, yes, sir.

21 Q. And on that occasion he was all by himself;
22 correct?

23 A. Yes, sir.

24 Q. Just out there working, minding his own
25 business; right?

1 A. Yes, sir.

2 Q. You had a warrant for his arrest; correct?

3 A. Yes, sir.

4 Q. And you called in to your superior and said I
5 think I can go up and arrest him right now, didn't you?

6 A. Yes.

7 Q. But you were told not to?

8 A. Yes, we were told not to.

9 Q. And instead what happened was your superiors
10 developed this ruse that was conducted on May 6th to
11 have Mr. Brown come down to West Lebanon; correct?

12 A. Yes.

13 Q. And there were a number of agents from
14 different agencies involved in that; correct?

15 A. It was all Marshal Service personnel.

16 Q. I'm sorry, but you brought in marshals from
17 other jurisdictions as well; correct?

18 A. Yes.

19 Q. You had snipers up on the hill; correct?

20 A. No.

21 Q. No?

22 A. I was up on the hill that day.

23 Q. Okay. You had an arrest team and a transport
24 team and the surveillance team all in place; isn't that
25 correct?

1 A. Yes.

2 Q. How many total agents to arrest Mr. Brown on
3 May 6th?

4 A. Arresting agents would have been four. We had
5 four as an over watch, and then there was probably four
6 transport people.

7 Q. So that, by my brief count, is 12?

8 A. 12.

9 Q. Were there any more than that? Anybody doing
10 surveillance or anybody else involved?

11 A. There could have been some surveillance teams,
12 but I just really can't recall.

13 Q. What about local or state police, were they
14 involved?

15 A. I know Lebanon Police Department had two
16 cruisers there.

17 Q. Now, sir, you testified about this incident
18 with Jason Gerhard where you saw him at the -- was it
19 the Lebanon Police Department?

20 A. Yes, sir.

21 Q. As a Deputy United States Marshal, do you
22 receive training in the United States Code, the law of
23 the United States, federal law?

24 A. Yes.

25 Q. And you're aware, sir, aren't you, that 18 --

1 Title 18, Section 2381 is in fact a law that makes
2 treason illegal?

3 A. I would need to see the code.

4 MR. IACOPINO: May I approach, your Honor?

5 THE COURT: Yes.

6 Q. BY MR. IACOPINO: Let me show you 18, United
7 States Code, Section 2381, deputy.

8 A. Yes, sir.

9 Q. And is that in fact the law that makes treason
10 illegal in the United States?

11 A. Yes.

12 Q. And in fact does the law state what the
13 penalty for treason is?

14 A. Yes.

15 Q. And what is it?

16 A. Let's see, the United States -- guilty of
17 treason shall suffer death or shall be in prison not
18 less than five years and fined under this title but not
19 less than \$10,000.

20 Q. So when Mr. Gerhard said to you that the
21 penalty for treason is death, it was a correct statement
22 of the law as you just read it; isn't that correct?

23 A. Yes.

24 Q. And you weren't afraid of that statement, were
25 you?

1 A. Not for myself, no.

2 MR. IACOPINO: Thank you. I have nothing
3 further, your Honor.

4 THE COURT: Government?

5 REDIRECT EXAMINATION

6 BY MS. OLLILA:

7 Q. Deputy Berry, at the time Jason Gerhard went
8 to the Lebanon Police Department on July 18, 2007, how
9 long had it been since Ed Brown left trial on the tax
10 evasion charges?

11 MR. IACOPINO: Objection, beyond the scope.

12 THE COURT: Overruled.

13 THE WITNESS: Approximately seven months.

14 Q. Were there arrest warrants out for Edward and
15 Elaine Brown?

16 A. Yes.

17 Q. Is it your job to effectuate arrest warrants?

18 A. Yes.

19 Q. Were you engaged in treason, Deputy Berry?

20 A. No.

21 Q. Now, Mr. Iacopino just questioned you about
22 how many officers were there to effectuate the arrest
23 warrants of Edward and Elaine Brown in May of 2006. You
24 recall his questions?

25 A. Yes.

1 Q. And he asked you a question about whether or
2 not you saw Ed Brown mowing the lawn before May 24th.
3 Do you recall that question?

4 A. Yes.

5 Q. While you were doing surveillance of Ed Brown,
6 did you ever see him with weapons?

7 A. Yes.

8 Q. How often did you see him with weapons?

9 A. Every time we saw him.

10 Q. Did you ever look in his car?

11 A. Yes.

12 Q. Did you look in it from outside?

13 A. Yes.

14 Q. Did you ever open the door to get into his
15 car?

16 A. No.

17 Q. When you would looked in it, what was there?

18 A. There was a rifle.

19 Q. Why didn't you attempt to arrest him when he
20 was mowing the lawn?

21 A. There was safety concerns because he was
22 armed.

23 Q. And how many men did you have with you that
24 day when you saw him mowing the lawn?

25 A. Myself and Ken Nunes.

1 Q. You had two men; is that correct?

2 A. Yes.

3 MS. OLLILA: Nothing further, your Honor.

4 THE COURT: Thank you. Mr. Lange?

5 MR. LANGE: Nothing further.

6 THE COURT: Thank you. Mr. Iacopino?

7 RECROSS-EXAMINATION

8 BY MR. IACOPINO:

9 Q. You were aware on that day when you called in
10 and asked for permission to arrest Mr. Brown that he
11 carried a weapon as a matter of course; isn't that
12 correct?

13 A. Yes.

14 Q. But you called in anyway, didn't you, to get
15 permission to make the arrest?

16 A. Yes.

17 Q. Because you felt you could reasonably do it;
18 isn't that correct?

19 A. At the time, yes.

20 MR. IACOPINO: Thank you.

21 THE COURT: Government?

22 MS. OLLILA: Nothing further.

23 THE COURT: Thank you. Mr. Lange?

24 MR. LANGE: Nothing further.

25 THE COURT: Thank you. You may step down.

1 Call your next witness, please.

2 MS. OLLILA: The United States calls Deputy
3 Ken Nunes.

4 THE CLERK: Please raise your right hand.

5 KENNETH NUNES

6 having been duly sworn, testified as follows:

7 THE CLERK: Please be seated. And for the
8 record, if you'd please state your name and spell your
9 name.

10 THE WITNESS: My name is Kenneth Nunes. The
11 last name N-U-N-E-S.

12 THE COURT: You may proceed.

13 MS. OLLILA: Thank you, your Honor.

14 DIRECT EXAMINATION

15 BY MS. OLLILA:

16 Q. Sir, how are you employed?

17 A. Currently I'm the senior inspector with the
18 United States Marshal Service.

19 Q. What's a senior inspector?

20 A. I work for the Investigative Operations
21 Division which is a division that specializes in
22 fugitive investigations within the Marshal Service.

23 Q. And what district do you work in?

24 A. Currently I'm not -- I don't work in a
25 district, I work directly for headquarters. We're a

1 division of the Marshal Service in general, so I'm not
2 assigned to a specific district.

3 Q. Were you employed in the same capacity in the
4 year 2006?

5 A. No. In 2006 I was a deputy in the District of
6 New Hampshire.

7 Q. What were your duties in 2006 as a deputy in
8 this district?

9 A. In 2006 my duties would have been the general
10 duties of a Deputy United States Marshal which would
11 include fugitive investigation, witness protection,
12 asset forfeiture, court responsibilities, et cetera.

13 Q. In April of 2006 were you tasked with
14 conducting surveillance on Edward and Elaine Brown?

15 A. Yes.

16 Q. Why?

17 A. We received a request from the IRS for
18 assistance with executing an arrest warrant on Edward
19 and Elaine Brown. So at that time one of the first
20 things we did was, you know, surveillance.

21 Q. When you say one of the first things we did,
22 who is we?

23 A. It was myself and other deputies in the
24 district.

25 Q. And who would some of those other deputies be?

1 A. Jamie Berry, Jeffrey White. Those are the two
2 other main guys that helped on that.

3 Q. How long did you engage in surveillance of
4 Edward and Elaine Brown?

5 A. In 2 -- early 2006 it was probably a month to
6 a month and a half.

7 Q. And by way of surveillance that means
8 following them around in a covert fashion?

9 A. Yes. It was covert surveillance, so we were,
10 you know, attempting to remain hidden, to try and
11 observe different patterns, to try and ascertain, you
12 know, some background and what, you know, possibly
13 develop a plan.

14 Q. And did you see Edward and Elaine Brown while
15 you conducted surveillance?

16 A. Yes, we did.

17 Q. Did you ever see Edward Brown with a weapon on
18 him?

19 A. Yes.

20 Q. How often?

21 A. Every time that I observed him and was close
22 enough to see, I was able to see a weapon in his
23 waistband.

24 Q. And did you ever go up to his vehicle while he
25 was not in it and look inside?

1 A. I did.

2 Q. Did you ever open the door to the vehicle?

3 A. No.

4 Q. What would you see when you looked inside?

5 A. He was carrying an M1 carbine which is a
6 military type, you know, World War II career military
7 type rifle that fires a 30 carbine round. It was with a
8 long wooden shoulder stock. It was in between the two
9 seats where the console is, in between but visible
10 through the window.

11 Q. All right. Now let me direct your attention
12 to July 2007. Are you aware that in July 2007 there
13 were arrest warrants for Edward and Elaine Brown?

14 A. Yes, there were.

15 Q. And was this after their tax evasion trial?

16 A. Yes.

17 Q. Did something happen on July 17, 2007?

18 A. It did.

19 Q. What happened on that date?

20 A. (No response.)

21 Q. Was there a motor vehicle accident?

22 A. There was. There was a -- we were called to
23 the parking lot of the Ninety Nine Restaurant in
24 Lebanon, New Hampshire, by a sergeant with Lebanon
25 police, and he called and said you might want to come

1 over here. Elaine Brown's vehicle was just in an
2 accident.

3 Q. Who was in Elaine Brown's vehicle when there
4 was an accident?

5 A. It was a subject that we identified as Jason
6 Gerhard and two other females.

7 Q. Had you ever seen Jason Gerhard prior to that
8 date, July 17, 2007?

9 A. Yes, I had.

10 Q. Where had you seen him, Deputy Nunes?

11 A. I observed him at the commercial dental
12 property in Lebanon, New Hampshire. I had also observed
13 him at the Plainfield Police Department.

14 Q. Dena, please pull up 26-a. Deputy Nunes, if
15 you look at your monitor to your left. Who is depicted
16 in the photograph in Government's Exhibit 26a?

17 A. That's Jason Gerhard.

18 Q. Now, after the motor vehicle accident on
19 July 17th, 2007, were you at the Lebanon Police
20 Department the following day, July 18th, 2007?

21 A. Yes. We received a call from one of the
22 officers at Lebanon PD and he informed us that Jason was
23 at the PD in the lobby attempting to file a stolen
24 vehicle report.

25 Q. Well, when Elaine Brown's vehicle was in a car

1 accident the day before on July 17th, what happened to
2 the car, did someone seize it?

3 A. Yes, we seized it.

4 Q. When you say we, who do you mean?

5 A. The U.S. Marshals. Myself and my partner that
6 day.

7 Q. Now, when Jason Gerhard showed up at the
8 Lebanon Police Department the following day on the
9 18th of July, did you meet with him?

10 A. Yes.

11 Q. Were there other officers present?

12 A. Yes, there were three other deputies and there
13 was also a Lebanon police officer in the lobby.

14 Q. All right, now, the next series of questions I
15 just want yes or no answers to.

16 Did you speak with Jason Gerhard?

17 A. Yes.

18 Q. Did he speak with you?

19 A. Yes.

20 Q. Did he say anything to you, just yes or no,
21 about your efforts to arrest Edward and Elaine Brown?

22 A. Yes.

23 Q. What did he say to you about your efforts?

24 MR. LANGE: Objection.

25 MR. IACOPINO: Same objection we made, your

1 Honor, before at sidebar.

2 THE COURT: Let me see counsel.

3 AT SIDEBAR

4 THE COURT: What is the expected answer?

5 MS. OLLILA: The expected answer is that what
6 we were doing was a violation of the Constitution which
7 constituted treason punishable by death.

8 THE COURT: Same objections?

9 MR. LANGE: Yes.

10 MR. IACOPINO: Same objection. I'd also
11 object, your Honor, this is unnecessarily cumulative and
12 in violation of 403 in that it's the same testimony of
13 the witness that they just previously put on and that
14 any probative value of it coming in through this witness
15 is vastly outweighed by the cumulative and the unfair
16 prejudicial cumulative effect.

17 MR. LANGE: I join.

18 THE COURT: All right. It's overruled.

19 BEFORE THE JURY

20 Q. BY MS. OLLILA: Deputy Nunes, what did Jason
21 Gerhard say to you?

22 A. Well, when we entered the lobby --

23 THE COURT: The question is what did he say to
24 you.

25 Q. With respect to your attempts to arrest Edward

1 and Elaine Brown, what did he say to you?

2 A. He said that we were not following the
3 Constitution by attempting to arrest Ed and Elaine.

4 Q. What else did he say?

5 A. Well, I responded to that.

6 Q. Okay, and then what did he say?

7 A. He said that we were seen as enemies of the
8 Constitution and that would be considered treason, and
9 the penalty for treason was death.

10 Q. Deputy Nunes, were you conducting surveillance
11 of Danny Riley in July of 2007?

12 A. Yes.

13 Q. Excuse me, and were you conducting
14 surveillance of Danny Riley in August of 2007?

15 A. Yes.

16 Q. Did you at some point surveil him to a
17 Wal-Mart?

18 A. Yes.

19 Q. What happened?

20 A. We followed the vehicle he was driving into
21 the parking lot. Parked in the parking lot. Observed
22 him exit the vehicle, enter the Wal-Mart. He returned
23 out of the store to his vehicle. He was carrying
24 something at that time. We were far enough where we
25 couldn't see exactly what he was carrying. He got in

1 his vehicle and he made a couple other stops.

2 Q. And do you recall what month this occurred in?

3 A. I think this was some time in August.

4 Q. And did you enter the Wal-Mart in attempt to
5 find out where Danny Riley went?

6 A. At the conclusion of the surveillance that day
7 we did.

8 Q. And where did you go inside the Wal-Mart?

9 A. To the photo developing area.

10 Q. And did you gain anything or get anything from
11 the photo developing area?

12 A. Yes, we did.

13 Q. Were the employees helpful and able to speak
14 with you without a problem?

15 A. They were.

16 Q. Let me show you what's marked as Government's
17 Exhibit 11g for identification. Do you recognize what
18 that photograph is of?

19 A. Yes, I do.

20 Q. What is it of?

21 A. It's a photo of Ed and Elaine Brown.

22 Q. How did you get it?

23 A. We obtained it from the Wal-Mart kiosk which
24 is a fancy printer that you put a memory card in.

25 Q. Is that picture a fair and accurate depiction

1 of the photograph you obtained that day in August of
2 2007?

3 A. Yes, that looks like the exact photograph we
4 obtained.

5 MS. OLLILA: Your Honor, the United States
6 moves 11g into evidence.

7 MR. IACOPINO: Objection, irrelevant.

8 THE COURT: Overruled.

9 MR. LANGE: Objection --

10 THE COURT: Same objection? Overruled.

11 (Government's Exhibit 11g admitted.)

12 MS. OLLILA: Dena, please bring up 11g.

13 Q. BY MS. OLLILA: Deputy Berry, who is this a
14 photograph of?

15 A. This is a photograph of Edward and Elaine
16 Brown.

17 Q. Does Edward Brown appear to have something
18 tucked into his pants?

19 A. He does.

20 Q. What is tucked into his pants?

21 A. A pistol.

22 Q. Now, let me just back you up one more time.

23 In March of 2006, March 24th, 2006, did you
24 accompany members of the probation department to the
25 Brown residence?

1 A. I did.

2 Q. Were you there to assist members of the
3 probation office?

4 A. Yes.

5 Q. Were you let inside the residence?

6 A. Yes, we were.

7 Q. Did you go into the master bedroom?

8 A. Yes.

9 Q. Did you go into a safe -- or was a safe opened
10 in the master bedroom?

11 A. There was a safe there, yes.

12 Q. Did someone open it?

13 A. Yes.

14 Q. Who opened it?

15 A. Elaine Brown.

16 Q. Was there money in that safe?

17 A. There was.

18 Q. What did the money look like to you. Can you
19 describe it by identifying how large it was?

20 A. It was on the bottom shelf of the safe, and
21 from where I was standing it appeared to be a cube,
22 probably a foot by a foot and some depth, I couldn't see
23 how deep the cube would have been.

24 Q. Was it in a bag?

25 A. It was -- it wasn't -- it didn't appear to be

1 a bag. It appeared to be some type of shrink wrap type
2 plastic around it.

3 MS. OLLILA: I have no further questions, your
4 Honor.

5 THE COURT: Thank you. Cross-examination, Mr.
6 Lange.

7 CROSS-EXAMINATION

8 BY MR. LANGE:

9 Q. What you just described, did you take it out
10 of the safe?

11 A. No.

12 Q. Did you make any effort to open the bag?

13 A. No.

14 Q. Did you photograph the bag?

15 A. I did not.

16 Q. Did anybody else who was there with you
17 photograph the bag?

18 A. I believe there is a photograph of it, but --

19 Q. Have you seen the photograph?

20 A. Yes.

21 Q. And where did you see the photograph?

22 A. I believe it was in the series of photographs
23 that somebody took of the search in general that day.

24 Q. So you think that there's a photograph of the
25 search done on March 24th of 2006 which will show what

1 you just described?

2 A. I believe so.

3 MR. LANGE: Thank you.

4 THE COURT: Thank you, Mr. Lange. Mr.

5 Iacopino, questions?

6 CROSS-EXAMINATION

7 BY MR. IACOPINO:

8 Q. Let me get something straight, deputy. The
9 role the United States Marshals were to play on that day
10 where you claim to have seen this cube is to assist
11 probation in removing any firearms from the home;
12 correct?

13 A. Yes.

14 Q. Your role was not to search the Browns'
15 residence, was it?

16 A. Our role was to insure that there were no
17 dangers there present while probation carried out their
18 duties.

19 Q. And it was probation's obligation to take the
20 firearms; correct?

21 A. Yes.

22 Q. And in fact, probation was further ordered by
23 the magistrate judge in that case to take those firearms
24 to a gun shop in Hooksett, New Hampshire, for
25 safekeeping; correct?

1 A. I believe that's where the firearms ended up,
2 yes.

3 Q. You weren't tasked in taking pictures or doing
4 any other kind of search on that day, were you?

5 A. We would have been responsible to insure that
6 there were no dangers in the residence, and part of that
7 would have been accomplished by a search.

8 Q. It wouldn't be accomplished by taking pictures
9 of anything, though; would it?

10 A. No.

11 Q. Let me bring you back to I think it was
12 identified as being in July of 2007 when you had the
13 contact with Mr. Gerhard.

14 You weren't at the Lebanon Police Department
15 when Mr. Gerhard arrived there; correct?

16 A. Correct.

17 Q. You received a call from somebody at the
18 Lebanon Police Department and you responded?

19 A. Yes.

20 Q. And it wasn't just you -- I take it at the
21 time it's fair to say Deputy Berry was pretty much your
22 partner?

23 A. He was that day, he was up there that day,
24 yes.

25 Q. So it wasn't just you and Deputy Berry that

1 responded to the Lebanon Police Department, but there
2 was another group of marshals that responded as well?

3 A. There were four of us together at the time
4 that responded over there.

5 Q. And you responded there because Mr. Gerhard
6 wanted to make a stolen motor vehicle report; correct?

7 A. Correct.

8 Q. And the Lebanon police officers simply could
9 have taken that report and provided you with a copy of
10 it; isn't that correct?

11 A. Yes.

12 Q. It's not your role as the United States
13 Marshal to take a stolen motor vehicle report, is it?

14 A. No.

15 MR. IACOPINO: Nothing further, your Honor.

16 THE COURT: Thank you, Mr. Iacopino.
17 Government?

18 MS. OLLILA: Nothing further, your Honor.

19 THE COURT: Thank you. Mr. Lange?

20 MR. LANGE: No, thank you.

21 THE COURT: You may step down. Thank you.

22 MR. HUFTALEN: May we approach?

23 THE COURT: Of course.

24 AT SIDEBAR

25 THE COURT: Yes?

1 MR. HUFTALEN: Subject to a few housekeeping
2 matters dealing with exhibits, a stipulation and asking
3 you to take judicial notice of one thing, the government
4 intends to rest at this point.

5 MR. LANGE: What's the judicial notice?

6 MR. HUFTALEN: Title 26, Section 1, based upon
7 your comments in your opening which I have at the table
8 where you, I believe, and I will paraphrase, state that
9 there's no clear statutory authority that Elaine could
10 look at that was in black and white that allowed her to
11 understand that there was an income tax.

12 MR. LANGE: I don't know if that's judicial
13 notice. I think it would be a jury instruction.

14 THE COURT: So you want me to excuse the jury
15 and deal with this in open court?

16 MR. HUFTALEN: I think so. And I'll do the
17 Rule 29 also.

18 THE COURT: Very good.

19 IN OPEN COURT

20 THE COURT: All right, ladies and gentlemen,
21 I'm going to excuse you at this time. Probably going to
22 be around a half hour. I've got some legal issues I
23 need to attend to. We will call you back after that.
24 This will constitute your mid-morning break.

25 (Jury exited the courtroom.)

1 THE COURT: You may be seated. Mr. Huftalen.

2 MR. HUFTALEN: Thank you, your Honor. I
3 believe it was yesterday, if it wasn't yesterday it was
4 the day previous, the government introduced an exhibit
5 which was the U.S. Marshal Service video sweep of the
6 property -- it wasn't yesterday, a couple days ago --
7 second video showing a sweep of the property we played
8 without the audio. I have today Government's Exhibit
9 4g-1 which we'd like to offer as the exhibit that will
10 go to the jury and not the one that had the audio.

11 THE COURT: All right. And there's no
12 objection to that, is that correct?

13 MR. LANGE: Correct.

14 THE COURT: All right. And hearing no
15 objection this will replace the other one for purposes
16 of going to the jury, but we will retain the G exhibit.

17 (Government's Exhibit 4g-1 admitted.)

18 MR. HUFTALEN: Likewise with Exhibit 1a-a
19 which is the undercover video of the arrest, I have a
20 copy that has no audio, and we'd offer to substitute
21 this for the previously marked and I believe admitted
22 copy of that video.

23 THE COURT: Is that without objection?

24 MR. LANGE: Without objection.

25 THE COURT: All right, submitted and it will

1 replace the other.

2 (Government's Exhibit 1a-a admitted.)

3 MR. HUFTALEN: I thought yesterday that I had
4 offered Government's Exhibit 7a-1 which is a Tannerite
5 instructional DVD that was actually played or a
6 significant portion of it was played. I am told that
7 what I offered was 7a-1a which is a copy of the
8 instructional DVD that had been in the box and had been
9 to the lab and was covered with dust powder. I'd offer
10 Government Exhibit 7a-1 which is in fact the DVD that
11 was played yesterday, and I understand that's without
12 objection as well.

13 THE COURT: Is that to replace the other
14 exhibit or in addition to?

15 MR. HUFTALEN: In addition to.

16 THE COURT: Any objection?

17 MR. LANGE: No, your Honor.

18 MR. IACOPINO: No, your Honor.

19 THE COURT: Without objection it's admitted.

20 (Government's Exhibit 7a-1 admitted.)

21 MR. HUFTALEN: Additionally, your Honor, we
22 have one stipulation that I will mark as the
23 government's next sequentially numbered exhibit.

24 THE COURT: What number would that be?

25 THE CLERK: 46, your Honor.

1 THE COURT: 46.

2 MR. HUFTALEN: And I'd like to read it into
3 the record and make it an exhibit as well.

4 THE COURT: All right, you'll have to do that
5 in front of the jury, but go ahead.

6 MR. HUFTALEN: So the court knows, it's
7 captioned in this case and reads: Stipulation. The
8 government and both defendants, Edward Brown and Elaine
9 Brown, through respective undersigned counsel stipulate
10 that Government Exhibits 8b, 8c, 8d, 8e, 8f, 8g, 8h, 8i,
11 8j, 8k, 8l, 8m, 8n, 8o, 8p, 8q, 8r, 8s, 8t, 8u, 8v, 8w,
12 9a, 9b-1, 9b-2, 9b-3, 9c-1 through 9c-10, 9c-11, 9c-12,
13 9d, 9e-1 through 9e-7, 9f-1 and 11j all contain
14 gunpowder, and then it has signatures of all counsel.

15 THE COURT: All right. Is that agreed to by
16 all counsel?

17 MR. LANGE: Agreed to by me, your Honor.

18 MR. IACOPINO: Yes, your Honor.

19 THE COURT: All right.

20 MR. HUFTALEN: Earlier --

21 THE COURT: That is admitted without
22 objection. Again, Mr. Huftalen, as soon as the jury
23 comes back, read that to them.

24 MR. HUFTALEN: I will, thank you.

25 (Government's Exhibits mentioned

1 above admitted.)

2 MR. HUFTALEN: Earlier in the proceedings the
3 government had moved to strike as surplusage three
4 enumerated paragraphs in the indictment. That was done
5 without objection. Those paragraphs were paragraph 10C,
6 10E and 10F.

7 THE COURT: 10C, 10E and 10F.

8 MR. HUFTALEN: E as in Edward, F as in frank.
9 At this point, without objection, I move to strike some
10 additional limited language which I have highlighted and
11 will give to the deputy clerk so there's no mistake.

12 What I propose to strike, generally, and I'll
13 read it in a moment, is some identifying information
14 with respect to the Colt firearm that there's been
15 testimony concerning Mr. Brown holding, and the Glock
16 firearm that was in Mrs. Brown's custody when she was
17 arrested.

18 As the indictment now reads in a number of
19 places as to the Colt, it says a Colt Model 1911, .45
20 cal. handgun. I propose to strike each place where that
21 appears the words Model 1911, .45 cal. So it merely
22 reads a Colt handgun. That appears at paragraph 10B,
23 paragraph 10HH, and paragraph 17.

24 Likewise with the Glock handgun, the
25 indictment in several places now reads a Glock Model 17

1 .40 cal. handgun. I propose to strike each time where
2 that appears the words Model 17 .40, so that it reads
3 after it's stricken, a Glock handgun. That appears at
4 paragraph 10D, paragraph 10II, and at paragraph 18.

5 And for the deputy clerk's benefit I will hand
6 that copy that's marked to her.

7 THE COURT: Very good. Without objection, is
8 that correct, Mr. Lange?

9 MR. LANGE: Yes, your Honor.

10 THE COURT: Mr. Iacopino?

11 MR. IACOPINO: Yes, sir.

12 THE COURT: Done.

13 MR. HUFTALEN: And your Honor, during Mr.
14 Lange's opening statement, a transcript of which I have
15 in front of me, he said, among other things, now you're
16 going to hear evidence in this case about plausible
17 argument that there is no statutory provision which
18 clearly states in black and white that we have a duty to
19 pay federal income tax on the gain from our personal
20 labor. I'm skipping part of his text, and then he says
21 typically for someone like Elaine, that duty is not
22 clearly and succinctly laid out in statutory language in
23 some book which you and I can open and point to and read
24 and understand for ourselves. In light of those remarks
25 I'd request that the court take judicial notice of Title

1 26, Section 1, and include in your instructions the
2 reference to Title 26, Section 1, which is that portion
3 of the Internal Revenue Code which deals with personal
4 income tax.

5 MR. LANGE: I object to that, your Honor. The
6 language in the section that they would propose you give
7 to the jury states very succinctly there is hereby
8 imposed on a taxable income and so on, a tax determined
9 in accordance with the following table. The issue is
10 taxable income. There is no clear definition of what
11 taxable income is.

12 THE COURT: Mr. Lange, are you going to argue,
13 is it your intent to argue to the jury that your client
14 did this because she didn't find a taxable income
15 provision in the federal statutes, is that your
16 position?

17 MR. LANGE: My position is going to be that
18 she did not find, as I indicated in my opening, the
19 government correctly quoted me, my position is going to
20 be the same in closing, that she did not find in the
21 income tax laws a clear statement what constitutes
22 taxable income.

23 THE COURT: Therefore what?

24 MR. LANGE: And therefore she had a good faith
25 reason for believing that she was unjustly convicted in

1 the other trial.

2 THE COURT: I'm not sure I'm going to permit
3 you to argue that over objection. I'll consider that
4 issue. I won't give a -- I won't at this time rule with
5 regard to an instruction issue rather than a judicial
6 notice issue. Go ahead.

7 MR. IACOPINO: Your Honor, I would also lodge
8 our objection on the basis that counsel's statement in
9 the openings are not evidence and I assume the court's
10 going to give the jury instruction that such statements
11 are not evidence.

12 THE COURT: I do intend to do that. Anything
13 else from the government?

14 MR. HUFTALEN: No, your Honor. The government
15 rests.

16 THE COURT: Very good.

17 MR. LANGE: Your Honor, I have a couple of
18 points. I want to make sure that Defendant's Exhibit
19 2-0 is a full exhibit.

20 THE COURT: Is 2-0 in?

21 THE CLERK: Defendant's exhibit, yes.

22 MR. LANGE: Also 2-i, Defendant's 2-i.

23 THE COURT: Is that in?

24 THE CLERK: 2i-1.

25 MR. LANGE: That would be the one without the

1 audio.

2 THE CLERK: There's 2i-1 is the video without
3 the sound, yes.

4 THE COURT: There you go. Anything else, Mr.
5 Lange?

6 MR. LANGE: Not at this time.

7 THE COURT: All right. Mr. Iacopino, do you
8 have anything?

9 MR. IACOPINO: I do have a Rule 29 motion.

10 THE COURT: We will deal with that in a
11 second. The government's got a piece of paper in his
12 hand.

13 MR. HUFTALEN: Yes, I apologize. Government's
14 Exhibit 1a-3 which is the fingerprint card that Ms. Rees
15 used during her testimony, we offered it subject to
16 later testimony by Deputy Berry. At the time we offered
17 it the ID, as we call it in New Hampshire, was stricken.
18 AUSA Ollila did have Agent Berry or Deputy Berry testify
19 that it was in fact a record kept in the ordinary course
20 of the Marshal Service. To the extent that it wasn't
21 offered or received full, we offer it.

22 THE COURT: Any objection? No objection is
23 heard. It's in.

24 (Government's Exhibit 1a-3 admitted.)

25 MR. HUFTALEN: Thank you. Nothing further.

1 The government rests.

2 THE COURT: Very good. Mr. Lange, do you want
3 to argue your motion first or second?

4 MR. LANGE: I'll argue the motion first.

5 THE COURT: Go right ahead.

6 MR. LANGE: The first point I want to bring up
7 is the Petrozziello -- you know the case.

8 THE COURT: Well, no, that's at the end of all
9 evidence.

10 MR. LANGE: All right, Okay.

11 THE COURT: You're a little premature.

12 MR. LANGE: All right. The second point --

13 THE COURT: Petrozziello.

14 MR. LANGE: Petrozziello.

15 THE COURT: I think you're a little premature.
16 You're free to make your motion, but I think I'm
17 correct, that it's at the end of all evidence.

18 MR. LANGE: I will renew it later. With
19 respect to Count One of the indictment as modified,
20 Count Two with respect to the indictment as it charges
21 my client, and with respect to Count Four which charges
22 my client, I move pursuant to Rule 29 of the Federal
23 Rules of Criminal Procedure for a directed verdict of
24 acquittal on those counts. My position is that with
25 regard to Elaine Brown the government has not met its

1 burden --

2 THE COURT: Which counts are those again?

3 MR. LANGE: They are counts one.

4 THE COURT: One.

5 MR. LANGE: Two.

6 THE COURT: Two, yup.

7 MR. LANGE: And four.

8 THE COURT: Okay. Go ahead. Sorry to
9 interrupt.

10 MR. LANGE: Succinctly stated, my point is
11 that the government has not proven with respect to
12 Elaine Brown that she was involved in the conspiracy as
13 alleged in those counts, and that they have not been
14 proven to the satisfaction of any reasonable juror
15 beyond a reasonable doubt that she in fact was involved
16 in the conspiracy, and more particularly have not proven
17 that she was involved in bringing explosive compounds
18 into the home, assembling those devices, and publicly
19 announcing any intention to resist arrest by virtue of
20 those devices and similar destructive devices. I at
21 this point concede that the government has met its
22 burden at this point to show a prima facie case with
23 respect to the other counts, but with regard to those
24 three counts they have not met their burden.

25 THE COURT: The motion is denied. Mr.

1 Iacopino.

2 MR. IACOPINO: Thank you, your Honor. Your
3 Honor, at this time I would move to dismiss under Rule
4 of Criminal Procedure 29 Counts One, Two, Three, Seven,
5 Nine and Ten of the indictment. Those are all counts
6 that are lodged against Mr. Brown. I will work
7 backwards, your Honor.

8 With respect to Count Ten, that charges Mr.
9 Brown with failure to appear for sentencing in violation
10 18, USC, Section 3146. The record evidence in this case
11 fails to establish that Mr. Brown was ever ordered by a
12 court to appear for sentencing. There is no evidence
13 within this record that demonstrates that a court
14 ordered him to appear. Although there is evidence that
15 there was an arrest warrant issued for him, there is no
16 evidence that that arrest warrant was ever served upon
17 him or that he in any way otherwise received an order of
18 the court notifying him to appear for sentencing as
19 alleged in the indictment.

20 Similarly, your Honor, with respect to Count
21 Nine which charges my client under the same statute with
22 failure to appear for trial, the evidence before the
23 court and before this jury in this case is that my
24 client appeared and eventually did not continue to go to
25 his trial. However, your Honor, under that statute it

1 requires an order of the court directing him to appear,
2 and in this particular case there was no order directing
3 him to appear on the next day of trial. There is no
4 evidence establishing that the judge in that trial told
5 him you have to appear here tomorrow for the
6 continuation of the trial, and there is no evidence in
7 the record otherwise demonstrating that any formal order
8 of the court was made to Mr. Brown directing him to
9 appear for trial. What is in evidence, your Honor, are
10 bail receipts that says -- not bail receipts but the
11 conditions of release on bail, your Honor, and I forget
12 the exhibit numbers at this point, but perhaps Ms.
13 Clouser can help me in a moment, those, if you look at
14 those exhibits, your Honor, the way the court works here
15 in the District of New Hampshire, there's actually a
16 space to put the date for their next appearance in
17 court. In those no date is present. Above that there
18 is a requirement indicating that the defendant appear as
19 required by the court, yet the government has not
20 completed the obligation showing that the defendant, or
21 presented any evidence, that the defendant was in fact
22 required by the court to appear in the continuing course
23 of their trial, nor is there any evidence that at any
24 point in time Mr. Brown was instructed by Judge
25 McAuliffe that he even had to appear for his trial at

1 all. And those exhibits are Exhibit 1a -- I'm sorry,
2 that's Elaine Brown. 1a-2, your Honor, is the order
3 setting conditions of release dated on May 24th, 2006.
4 And on that basis, your Honor, I would move to dismiss
5 under Rule 29 Counts Nine and Ten.

6 Your Honor, I also move to dismiss Counts One,
7 Two and Seven, and I actually have two motions with
8 respect to counts -- with respect to Count One. So I'll
9 address One, Two and Seven first, your Honor.

10 Each of these counts in the indictment allege
11 that the defendant either conspired to prevent arrest,
12 conspired to impede the United States Marshal Service,
13 or actually obstructed justice by impeding the United
14 States Marshal Service. In essence, they're really all
15 charges that claim my client violated the law under
16 basically the same set of actions. And the evidence of
17 those actions that is before this court is that my
18 client never made an affirmative step to voice anything
19 that can reasonably be construed as force, violence,
20 intimidation or threats to any United States Marshal,
21 and for basis -- and on that basis, your Honor, I would
22 respectfully submit that Counts One, Two and Seven must
23 be dismissed under Rule 29.

24 I also would submit that Count Three which
25 charges my client with being a felon in possession --

1 I'm sorry, charges my client with possession of a
2 weapon, use and carrying of a weapon during the
3 commission of a crime of violence must also fail. That
4 particular count specifically references Counts One and
5 Two as being a crime of violence, and obviously since
6 the government has not made their case on Counts One and
7 Two, Count Three must be dismissed as well.

8 Your Honor, I would also point out that in
9 Count One of the indictment the government has set forth
10 in the indictment a number of overt acts of which there
11 has been no proof, and I'm going to list those for the
12 court at this time.

13 I would suggest to the court that in paragraph
14 ten of Count One, which begins on page four, but
15 specifically if you go to page five of the indictment,
16 subsection 10C alleges a radio interview where Elaine --

17 THE COURT: 10C has already been stricken I
18 believe.

19 MR. IACOPINO: I'm sorry, yes, 10E and F, your
20 Honor. I also draw the court's attention to 10H.

21 THE COURT: 10H.

22 MR. IACOPINO: 10H where they allege that
23 Jason Gerhard temporarily resided in the Browns' home.
24 There's been no evidence of that. That Cirino Gonzalez
25 temporarily resided in the Browns' home. There's been

1 no evidence of that in 10I. In 10J they allege that an
2 individual by the name of Robert Wolffe who I would
3 suggest his name is never even mentioned during the
4 course of this trial temporarily resided in the Browns'
5 home. In 10K the government alleges that Danny Riley
6 publicly declared his intention to forcibly resist any
7 effort by the Marshal Service to arrest. That has not
8 been established by any evidence in this case, your
9 Honor. In 10L, your Honor, they allege that Cirino
10 Gonzalez publically declared his intention to forcibly
11 resist. There's been no evidence of that. In 10M they
12 allege that Jason Gerhard publically declared his
13 intention to forcibly resist. There's been no evidence
14 about that allegation contained in Section 10M either.

15 I would also point to page eight of the
16 indictment, 10S, the last sentence of Section 10S, the
17 overt act there asserts that the -- there is a picture
18 in evidence, your Honor, of Mr. Brown and Mr. Gonzalez
19 and Jason and I believe with an individual named Luke,
20 that part of that subsection we don't dispute. There is
21 in fact a photograph that was posted to an account of a
22 social networking space, there is testimony it's
23 registered to Jason Gerhard, however, the last sentence
24 says that Internet account was used to elicit statements
25 in support of Edward Brown and Elaine Brown. That

1 sentence is incorrect, your Honor. There's been no
2 evidence of that in this trial. There's been absolutely
3 no evidence of that.

4 I would then draw the court's attention to 10W
5 which alleges that Robert Wolffe provided a 1992
6 Chevrolet Caprice to the Browns. There's been no
7 evidence of that in this trial.

8 10X, your Honor, which begins on page eight of
9 the indictment and goes over on to page nine alleges
10 that Robert Wolffe, again whose name we have not heard
11 during the course of this trial, conducted counter
12 surveillance. That has not been proven, your Honor.

13 With respect to 10Y they alleged that Mr.
14 Wolffe provided armed security. That has not been
15 proved in this case, your Honor.

16 With respect to 10Z they allege that Wolffe
17 made his residence available as a point of
18 transshipment. There's been no evidence of that. The
19 only evidence of any shipments that there has been, your
20 Honor, is of Tannerite that was shipped to Cohoes, New
21 York, I believe is the shipping address.

22 So, your Honor, I would draw your attention to
23 page 11 of the indictment, Section 10KK. There's an
24 allegation that there was evidence that Elaine Brown
25 held an assault rifle while in the presence of

1 undercover Deputy United States Marshals. I don't
2 believe that there was ever any testimony to that
3 effect, your Honor.

4 So in addition to moving that Count One be
5 dismissed under Rule 29 because even if you take all
6 inferences in a light most favorable to the government,
7 that they fail to establish a prima facie case. Even if
8 you choose not to do that, they have failed to establish
9 evidence on those overt counts and we'd move that at
10 least those overt acts, I'm sorry, alleged in Section 10
11 of the indictment that I've just listed, be dismissed
12 out of the indictment, your Honor.

13 MR. LANGE: I join with respect to the
14 argument about overt acts.

15 THE COURT: All right. Government, with
16 regard to 10J?

17 MR. HUFTALEN: No objection to that being
18 stricken.

19 THE COURT: 10J is stricken. 10K?

20 MR. HUFTALEN: No objection.

21 THE COURT: Stricken. 10L?

22 MR. HUFTALEN: No objection.

23 THE COURT: Stricken. 10M?

24 MR. HUFTALEN: Stricken.

25 THE COURT: Stricken.

1 MR. HUFTALEN: No objection, excuse me.

2 THE COURT: No objection, I understand,
3 stricken. 10S?

4 MR. HUFTALEN: I don't object to the last
5 sentence being stricken which is I believe what Mr.
6 Iacopino complained about.

7 MR. IACOPINO: Second to last sentence.

8 THE COURT: Second to last sentence is
9 stricken.

10 MR. HUFTALEN: Oh, second to the last
11 sentence.

12 THE COURT: All right.

13 MR. LANGE: And I would ask that the last
14 sentence also be stricken. I don't recall seeing rifles
15 in photographs. Maybe I'm wrong.

16 MR. HUFTALEN: As a factual matter, if you
17 look at the picture, you can see the rifles --

18 THE COURT: Next to the last sentence is
19 stricken. 10W?

20 MR. HUFTALEN: No objection.

21 THE COURT: Stricken. 10X?

22 MR. HUFTALEN: No objection.

23 THE COURT: That is stricken. 10Z?

24 MR. HUFTALEN: No objection.

25 THE COURT: That is stricken. 10KK?

1 MR. HUFTALEN: No objection.

2 THE COURT: That is stricken. Anything else
3 from the government?

4 MR. HUFTALEN: No, thank you.

5 THE COURT: All right. And to the extent the
6 motion has any other grounds for dismissal, that motion
7 is also denied.

8 All right, we're going to take a look at the
9 video. Who is going first, Mr. Iacopino?

10 MR. IACOPINO: Yes, your Honor.

11 THE COURT: All right, you ready to go?

12 MR. IACOPINO: Yes, your Honor.

13 MR. LANGE: We're going to look at the Fazio,
14 it's an audio.

15 MR. IACOPINO: Yes, it's an audio.

16 THE COURT: Just an audio? All right, I'll
17 listen to it. Yes?

18 MR. HUFTALEN: I saw counsel poke his head in
19 the back who I believe the court has appointed to
20 represent one of the witnesses.

21 THE COURT: That's one of your witnesses, is
22 that correct?

23 MR. LANGE: That's it, that's an Elaine Brown
24 witness.

25 THE COURT: All right, let me get started with

1 them. Counsel is here?

2 MR. HUFTALEN: I saw at least one. I saw Mr.
3 Ramsdell.

4 THE COURT: Good, I'm going to see -- bring up
5 the audio. I will see counsel in chambers. I want to
6 listen to the audio with counsel present. Then we will
7 talk to counsel for those two witnesses.

8 (Recess taken.)

9 (In chambers with counsel at 10:20
10 a.m.)

11 THE COURT: We're in chambers with counsel.
12 I've been provided with two exhibits proposed by
13 defendant Elaine Brown.

14 MR. IACOPINO: Ed Brown.

15 THE COURT: Ed Brown, I'm sorry. This is
16 Exhibit 1h-1 and 1g-1. And does it make any difference
17 which one I play first?

18 MS. CLOUSER: 1g-1 is the first interview.

19 MR. IACOPINO: And it is the longer one, too,
20 I think.

21 MS. CLOUSER: It is the longer one.

22 (Pause.)

23 THE COURT: Is there objection to both of
24 these?

25 MR. HUFTALEN: Yes. Hearsay.

1 (Radio interview being played.)

2 MS. CLOUSER: That's the end of that clip.

3 THE COURT: That's it?

4 MS. CLOUSER: Yup.

5 MR. HUFTALEN: That's not the end of the CD.

6 THE COURT: That's the end of that?

7 MS. CLOUSER: Yup.

8 MR. IACOPINO: That's the end of the excerpt.

9 MR. HUFTALEN: I thought they were all on the
10 same CD?

11 MS. CLOUSER: No, they are each on separate
12 CDs.

13 THE COURT: All right, the record should
14 indicate that I've now listened to Exhibit 1h-1 with
15 counsel present. And now I'm going to listen to Exhibit
16 1g-1. Is that the longer one?

17 MS. CLOUSER: Yes.

18 MR. IACOPINO: I think it's approximately
19 13 minutes, your Honor.

20 THE COURT: And you want to admit both of
21 those in their entirety?

22 MR. IACOPINO: In the entirety of the
23 excerpts.

24 THE COURT: That's what I mean.

25 MR. IACOPINO: Yeah, we received these from

1 the government. It's a whole radio show, your Honor --

2 THE COURT: What I'm saying now is both
3 exhibits as they appear you want in.

4 MS. CLOUSER: Yes.

5 MR. IACOPINO: Yes.

6 (Radio interview being played.)

7 MR. IACOPINO: I think that's it.

8 MS. CLOUSER: That's the end.

9 THE COURT: The record should indicate I've
10 now listened to Defendant's lg-1.

11 All right, why is this admissible over a
12 hearsay objection?

13 MS. CLOUSER: This is state of mind.

14 THE COURT: Under rule?

15 MS. CLOUSER: 803(3).

16 THE COURT: Go ahead.

17 MS. CLOUSER: He's indicating that after
18 June 7th that the federal U.S. Marshals have declared
19 their intention to use lethal force against them, and
20 it's our argument that the weapons that were found on
21 October 4th, there certainly have been no, beyond the
22 three weapons that were testified to with respect to the
23 U.S. Marshals who were surveilling the property on
24 June 7th, there's no indication that any of the weapons,
25 pipe bombs, anything else were there prior to June 7th,

1 and the reason that none of those items were there is
2 because it was after the U.S. Marshals declared their
3 intention to use lethal force that Ed and Elaine Brown
4 felt that they had to defend themselves against this
5 lethal force. And this radio show shows that Ed
6 believed reasonably after the show of force on June 7th
7 that the U.S. Marshals intended to use lethal force
8 against them. They shot at one of the supporters that
9 was at his house on June 7th, and their intention was to
10 kill the Browns.

11 THE COURT: Why is that 803(3)?

12 MS. CLOUSER: Well, it shows that Ed Brown's
13 state of mind at the time was that he had to use lethal
14 force to defend himself against the unlawful show of
15 force by the U.S. Marshals.

16 THE COURT: Government's position?

17 MR. HUFTALEN: I object. I believe it is
18 hearsay and I believe the case law in the First Circuit
19 as well as the advisory committee notes at 803(3)
20 clearly demonstrate that it is hearsay, and in
21 particular I bring the court's attention to U.S. versus
22 Alzanki, 54 F.3d 994, 1995 First Circuit; U.S. versus
23 Cianci, 378 F.3d 71, 2004; and U.S. versus Cohen, 631
24 F.2d 1223, 1980, Fifth Circuit. The advisory committee
25 notes in particular I think are apt in this case where

1 they say, and I quote, the exclusion of statements of
2 memory and belief to prove the fact remembered though
3 believed is necessary to avoid the virtual destruction
4 of the hearsay rule which would otherwise result in
5 allowing state of mind provable by a hearsay statement
6 to serve as the basis for an inference of the happening
7 of the event which produced the state of mind, and it
8 cites to Shepard versus United States, 290 U.S. 96, 1933
9 case. There are several other cases cited as well. I
10 think the attempt by the defense to put these statements
11 in, albeit there are some nuggets in there that I'd like
12 to get in front of the jury, it's not worth the price of
13 admission for me, clearly is an attempt to put in their
14 theory of the case, that is, show us the law and we'll
15 pay, we're non-violent people, without exposing
16 themselves to cross-examination. It's hearsay and it's
17 inadmissible.

18 THE COURT: All right, my ruling is that in
19 their entirety each exhibit is hearsay. It does not
20 come within Rule 803(3). To the extent that minute
21 portions of it do, although it hasn't been offered
22 separately, the law in my mind is clear that the
23 declarant here is attempting to show reasons for his
24 state of mind and that's prohibited as set forth in
25 Alzanki that the government cited.

1 I also would note that in my view the
2 defendant in this case is attempting to show why
3 something was not done in the past. That's covered by
4 the Cianci case.

5 I also find that these are self-serving
6 attempts to cover tracks already made and they don't --
7 these statements have no indicia of reliability. This
8 is an individual who is in the midst of criminal
9 activity attempting to create an alibi, a reason for the
10 criminal activity while in the midst of it. That
11 doesn't give any indicia of reliability as to these
12 statements. So as presented these exhibits are excluded
13 as hearsay.

14 What else before we go back?

15 MR. LANGE: Your Honor, we will probably be
16 visiting something similar when we get to the Elaine
17 Brown part of this case.

18 THE COURT: All right, do you have any audios
19 for me to listen to?

20 MR. LANGE: Not yet, your Honor, because I'm
21 going to offer them under --

22 THE COURT: You may. The attorney for who is
23 here?

24 MR. HUFTALEN: Both attorneys for the Dions
25 are here. William Christie I believe --

1 THE COURT: Just a second.

2 MR. HUFTALEN: Oh, sorry.

3 THE COURT: Let me write this down. William
4 Christie?

5 MR. HUFTALEN: William Christie,
6 C-h-r-i-s-t-i-e.

7 THE COURT: For?

8 MR. LANGE: He's for Scott Dion, D-i-o-n.

9 THE COURT: All right.

10 MR. LANGE: Michael Ramsdell is for the wife
11 Catherine, spelled with a C.

12 THE COURT: Are they here?

13 MR. LANGE: Yes.

14 THE COURT: Counsel want to do it at this time
15 or do you want to wait?

16 MR. LANGE: Now is fine.

17 THE COURT: Get them.

18 THE CLERK: Yes, sir.

19 THE COURT: Let's get Mr. Christie and Mr. --

20 MS. OLLILA: Ramsdell.

21 THE COURT: Ramsdell, thank you.

22 (Pause.)

23 THE COURT: Let me also indicate for the
24 record as regards to those exhibits. It seemed to be
25 attempting to apply the justification defense, and in my

1 view at this point I don't see a justification defense
2 as applicable. I'll expand on that as we move toward
3 jury instructions.

4 (Off the record.)

5 THE CLERK: This is attorney Bill Christie and
6 Attorney Ramsdell.

7 THE COURT: Have a seat. Have a seat. Okay.
8 We have present with us Mr. Christie and Mr. Ramsdell,
9 correct?

10 MR. RAMSDELL: Yes.

11 MR. CHRISTIE: Correct.

12 THE COURT: All right, preliminarily let me
13 thank both of you for coming forward and agreeing to
14 talk to these two individuals.

15 Mr. Christie, you had an opportunity to talk
16 to Mr. Dion, is that correct?

17 MR. CHRISTIE: That's right.

18 THE COURT: And without your telling me
19 anything that you two discussed, which is obviously
20 privileged, is it Mr. Dion's intent to waive any Fifth
21 Amendment rights that he may have and testify with
22 regard to this matter?

23 MR. CHRISTIE: It is not. His intention is to
24 assert the Fifth Amendment.

25 THE COURT: Mr. Ramsdell, have you had a

1 chance to talk to Mrs. Dion?

2 MR. RAMSDELL: I have, your Honor.

3 THE COURT: Again, without your indicating to
4 me whether or not what you've discussed specifically, is
5 it her intent to waive her Fifth Amendment rights or
6 assert them?

7 MR. RAMSDELL: She intends to assert them.

8 THE COURT: And you've been advised of the
9 nature of the proposed testimony, either of you?

10 MR. LANGE: I don't think that you have. You
11 have a little bit but --

12 MR. RAMSDELL: Well, I can tell you, I spoke
13 to Attorney Lange briefly yesterday. He gave me an idea
14 of at least some of the testimony he would seek to
15 elicit, and I shared the information I got with Attorney
16 Christie, and so we have some idea.

17 THE COURT: All right. What I propose to do,
18 I'll hear from counsel, but normally what I would do is
19 I would have these witnesses present, out of the hearing
20 of the jury, we will put them on the stand, I'll advise
21 them of their Fifth Amendment privilege. Counsel, you
22 indicate, if you want to indicate the issues that you
23 wish them to testify about, I'll determine from them
24 whether they wish to claim privilege with regard to
25 those specific issues. I'll hear counsel with regard to

1 any additional questions you want me to ask the
2 witnesses, and then we will make a decision with regard
3 to their testimony. Is that satisfactory to counsel?

4 MR. LANGE: It is, your Honor.

5 MR. IACOPINO: Yes.

6 MR. HUFTALEN: Yes.

7 THE COURT: Everyone agrees, very good. So we
8 will see them -- are they available at 2:30? Are you
9 available 2:30?

10 MR. CHRISTIE: Today? Yes.

11 MR. RAMSDELL: Yes.

12 THE COURT: We will do it as soon as we finish
13 with the day's trial so I don't keep you people late,
14 we'll but them right on.

15 Counsel, if you would, before 2:30 if you have
16 an opportunity, let Mr. Christie and Mr. Ramsdell know
17 generally the issues so that they can discuss it with
18 their clients, all right?

19 Anyone have anything else on the record? All
20 right, we're off the record. Thank you very much. I'll
21 see you both at 2:30 with your clients.

22 MR. RAMSDELL: Thank you.

23 MR. CHRISTIE: Thank you.

24 (Off the record.)

25 (Back in the courtroom at 10:50 a.m.)

1 THE COURT: Ready for the jury? Please bring
2 in the jury.

3 BEFORE THE JURY

4 THE COURT: Sorry for the delay, members of
5 the jury, we have been working throughout that period of
6 time, just kept you waiting.

7 All right, Mr. Iacopino, call your first
8 witness.

9 MR. IACOPINO: Thank you. Ed Brown.

10 (Testimony of Edward Brown previously
11 transcribed.)

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C E R T I F I C A T E

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I, Sandra L. Bailey, do hereby certify that

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the foregoing transcript is a true and accurate

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transcription of the within proceedings, to the best of

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my knowledge, skill, ability and belief.

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10 Submitted: 11/3/09

/s/ Sandra L. Bailey

SANDRA L. BAILEY, LCR, CM, CRR

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